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No. 479

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC. AND ROCKY MOUNTAIN MOTOR TARIFF BUREAU, INC., *Appellants*

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, et al., *Appellees*

On Appeal From the United States District Court For the District of Columbia

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APPELLANTS' BRIEF IN OPPOSITION TO MOTIONS TO AFFIRM

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Pursuant to Rule 16 of the Revised Rules of this Court, appellants submit this Brief in opposition to appellees' motions to affirm the judgment of the district court.

ARGUMENT

APPELLEES HAVE ESTABLISHED NEED FOR REVIEW

The Briefs of appellees in support of their motions to affirm have established that this appeal raises important questions of administrative law which can be resolved only by this Court's plenary consideration.

I. APPELLANTS' STANDING TO SUE

On the issue of appellant associations' standing to bring this suit on behalf of its members in the court below, the Government[1] states: "[W]e recognize that this precise issue has not been decided by this Court." (Government's Motion, p. 7.) The freight forwarders, in their Brief, do not support the holding of the court below in denying appellants' standing to sue, either by argument of their own or by adoption of the Government's argument on this point (Freight Forwarders' Brief, pp. 4-5, 11).

Although the aforestated admission of the Government would appear to constitute a major concession on this important issue, it is not. Rather, it is inaccurate, unless by "this precise issue" the Government is taken to have meant *this* issue of standing as presented by *these* appellants in *this case*. The irrefutable fact is that in *N.A.A.C.P. v. Alabama*, 357 U.S. 449, 459 (1958), this Court squarely held that an association was "the appropriate party" to assert the rights of its members where "the association . . . is but the medium

[1] The United States of America and the Interstate Commerce Commission, who filed jointly a motion to affirm, will be referred to herein as the "Government"; the remaining ten defendants who also filed jointly a motion to affirm will be referred to as the "freight forwarders."

through which its individual members seek to make more effective the expression of their own views." *The Government failed even to mention, much less to distinguish, this decision in its Brief;* nor did it mention two cases in the District of Columbia Circuit which followed the *N.A.A.C.P.* decision, *viz., MacArthur Liquors, Inc.* v. *The Palisades Citizens Ass'n, Inc.*, 265 F.2d 372 (1959) and *Archbold* v. *McLaughlin*, 180 F. Supp. 175 (1960). All of these cases were cited and discussed in appellants' Jurisdictional Statement.

The Government apparently sought to overcome this Court's controlling decision in *N.A.A.C.P.* by (1) ignoring it and (2) citing *two unreported, district court* cases to the contrary, one of which was decided four years and the other six years before *N.A.A.C.P.* Both district court cases involved "trade associations" rather than organizations, such as appellants, which exist and operate only by virtue of Act of Congress and orders of the Interstate Commerce Commission approving their charters and by-laws, pursuant to which appellants perform for their members important duties imposed on the members by the Interstate Commerce Act. Furthermore, the merits of this case directly involve those duties, which in the case of both appellants relate to the fixing of prices for their members' transportation services.[2]

Rather than joining the issue on the *N.A.A.C.P.* principle, the Government misconceived appellants' suit as an attempted "class action authorized by Rule 23(a)(3) of the Federal Rules of Civil Procedure, on which appellants rely" (Government's Motion, p. 6). Appellants' only purpose in making a secondary reference to Rule 23(a)(3) was to illustrate the modern

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[2] See J.S. 13-14.

trend towards avoiding a multiplicity of litigation (J.S. 12 n. 3). The Government's treatment of this point, however, goes far towards establishing that appellants' suit in the court below may well have constituted a valid class action authorized by Rule 23(a)(3). In asserting the contrary, the Government cites *Farmers Co-op. Oil Co.* v. *Socony-Vacuum Oil Co.*, 133 F.2d 101 (8th Cir. 1942) as standing for the proposition that "an association composed of persons, some of whom have an interest, cannot maintain a class action to assert the rights of its members" (Government's Motion, p. 6). The cited case involved a treble-damage antitrust suit and the court's decision turned, not on any inherent, legal disability of the plaintiff association to vindicate the rights of its members, but rather on the fact that the plaintiff's members were damaged, if at all, in varying degrees and that, therefore,

> 'Common relief' is not the object of the suit as would be the case were an injunction its purpose. (133 F.2d 105).

Here, an injunction is precisely the relief which appellants sought in the court below.

The attempt of the Government to introduce extra-record evidence that only "two or three" of appellants' members have an interest in the instant case (Government's Motion, p. 6 n. 3) reflects a failure to appreciate that all of appellants' members are injured by an order of the Commission which unlawfully expands the competition of a competing mode of transportation. The intervention in support of the Government of nine freight forwarders in addition to the one which was the respondent before the Commission underlines the obvious fact that the impact of the Commission's order is industry-wide and is not restricted to "two or

three" motor carriers, or any other number, which compete directly with the one freight forwarder which initiated this controversy before the Commission.

Finally, it should be observed that appellees made no effort whatever to dispute appellants' contention that they possess standing to sue under the *Sanders* doctrine. In *F.C.C.* v. *Sanders Bros. Radio Station*, 309 U. S. 470 (1940), this Court held that even though the suing party could not resist the grant of a license to another by the administrative agency on the ground that the resulting competition would work economic injury to him, such party nevertheless had the requisite standing to bring suit challenging the agency's order and to raise any relevant question of law in respect of such order. As shown on pages 16 and 17 of appellants' Jurisdictional Statement herein, the *Sanders* doctrine has been further developed by this Court in later cases and is recognized by eminent scholars as being of primary importance to the law of standing. As with the *N.A.A.C.P.* v. *Alabama* principle, *supra*, the Government apparently chooses to ignore, rather than argue, it.

II. LAWFULNESS OF COMMISSION'S ORDER

A. Contrary To Statutory Definition of Freight Forwarder

The challenged Commission order permits freight forwarders to hold out, and to perform, a service which does not include break-bulk and distributing operations at destination. The rate schedules approved by the Commission offer reduced rates to shippers and receivers of freight who will relieve the freight forwarders of these functions. The schedules provide for a freight forwarder service whereby shippers or receivers accept delivery of their freight at the freight forwarder's

terminal dock (thus relieving the freight forwarder of performing distribution to the consignee's door) or in the rail car (thus relieving the freight forwarder of performing both break-bulk and distributing operations). The schedules do not provide for this service only in extraordinary or unusual circumstances; rather, the service is held out as an ordinary and usual undertaking by the freight forwarder.

The court below held that the freight forwarders "will continue to hold themselves out as freight forwarders within the terms of the [Interstate Commerce] Act under this reduced rate schedule *even though in a precise sense*[1] *they may not break-bulk or distribute* . . . ." (J.S. 8a, emphasis added). The court so held despite the express language of section 402(a)(5) of the Act, the essence of which as here pertinent is that a freight forwarder is a common carrier which, "in the ordinary and usual course of its undertaking," *inter alia*, performs "break-bulk and distributing operations." (J.S. 4). The effect of the statute is to make each of these functions for a freight forwarder *sine qua non*, except in extraordinary or unusual circumstances.

At several points in its motion to affirm, the Government appears to have confused the issue in the instant case with that in *Eastern Express, Inc. v. United States*, 198 F.Supp. 256 (S.D. Ind) *aff'd per curiam*, 369 U.S. 37 (1962) (Government's Motion, pp. 5, 7, 8). There, the issue was whether freight forwarders lawfully could publish rates on volume shipments. Appellants have not raised such an issue in this case. Here, the issue is whether the Commission may approve rates which

[1] We do not understand Judge Burger's use of the phrase "in a precise sense," since the challenged rates contemplate that freight forwarders will not break-bulk or distribute in any sense.

provide for a service by freight forwarders which omits two functions expressly required of them by statute.

The Government takes a novel tack in this case when it seeks to leave solely to shippers the determination of what functions the various regulated modes of transportation shall perform. On page 8 of its Motion, the Government states:

> The option to dispense with these elements of the service lies with the shipper or consignee, not with the forwarder, who must perform them if requested to do so.

Under this theory, there would be little need for government regulation of the transportation industry. Freight haulers could with impunity publish passenger fares. Much less drastic deviations of the various modes of transport from their respective roles in the nation's transportation system have been struck down by the Commission and sustained by this Court. *Eastern Central Motor Carriers Ass'n* v. *United States*, 321 U.S. 194 (1944). The implication by the Government that the reduced rates are necessary to prevent unlawful discriminations among shippers (Government's Motion, p. 8) rests on the unfounded assumption, at least on this record, that all forwarder rates except the type here in issue are inherently discriminatory.

The argument of the forwarders that appellants have no regard for the consignee of "fragile or delicate goods" who prefers to take no chances with the forwarder's unloading and distributing his goods ignores the facts that (a) the shipper or consignee was free to choose a safer service, (b) the goods were assembled and consolidated by the same forwarder at origin, presumably without mishap, and (c) the goods moved across the continent in a railroad car.

B. Contravenes National Transportation Policy

The Government asserts that it is appellants' position, and not the Commission's order, which contravenes the National Transportation Policy, in that appellants would require the forwarders to maintain rates at an "artificially high level merely to protect the traffic of the motor carriers." (Government's Brief, p. 10.) This is a strange argument, especially in view of the Government's admission that appellants have never attacked the level of the rates in issue. The question here is not one concerning the level of the forwarder rates but rather the services which those rates must comprehend. If the Commission may permit the forwarders to abandon their functions of breaking-bulk and distributing, presumably it may do likewise, as to any of the other elements set out in section 402(a)(5) of the Act. Such a drastic change in the role of any of the regulated modes of transportation should come from the Congress, which has defined their respective roles.

CONCLUSION

Appellants pray this Court to deny the motions to affirm and to require briefs and oral argument on the substantial questions presented by this appeal.

Respectfully submitted.

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